(3)

No. 90-936

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Petitioners,

v.

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, individually and as Assistant District Attorney,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of New York, Appellate Division, Second Judicial Department

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS COUNTY OF WESTCHESTER AND CARL A. VERGARI, AS DISTRICT ATTORNEY

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QUESTIONS PRESENTED

1. Petitioners brought an action in state court for malicious prosecution. In the state court proceedings the petitioners did not raise a federal question, nor was one ruled upon. In their application to this Court, petitioners for the first time characterize their claim as a state action for malicious prosecution under the Fourteenth Amendment. Has a federal question been raised, and if it has, have petitioners overcome the weighty presumption against review where the federal question was not pressed or passed upon in the state courts below?

2. At the time the Grand Jury was convened, the prosecution was focused on particular crimes and individuals and the Grand Jury proceedings were not purely investigative. Is the prosecutor entitled, in connection with those proceedings, to absolute immunity from claims by those indicted of malicious prosecution or its federal counterpart?

3. When a prosecutor participates in an allegedly illegal search of the suspects' place of business, is he entitled to absolute immunity in connection with his subsequent activities in presenting a case against them before an indicting Grand Jury?

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COUNTERSTATEMENT OF THE CASE

1. Factual Background

On November 1, 1978 the law firm of Rosen & Bardunias, in a joint venture with the Westchester Bureau of Medical Economics, Inc., entered into a contract with the County of Westchester to do collection work on some of the delinquent accounts of persons who had been patients at the Westchester County Medical Center (WCMC). The contract provided that all collections were to be deposited into a bank account controlled solely by the County. The contract also mandated that the joint venturers make monthly reports setting forth the amount collected on a patient by patient basis.

In or about August, 1979 the County stopped forwarding new accounts to the joint venture due to its unsatisfactory collection results. However, Rosen & Bardunias was permitted to continue to work on the accounts already referred to it. Nevertheless, no reports and monies associated with these accounts were received from Rosen & Bardunias or the Westchester Bureau of Medical Economics, Inc., from late 1979 until in or about May and June, 1982, when suddenly the County received lump sums of approximately $19,400 and $3,600 from the law firm. This apparent irregularity was not noticed by any County employee at the time.

In or about August, 1982 the District Attorney's office was contacted by an employee of Rosen & Bardunias, who stated that Peter Bardunias, the sole proprietor of the firm, had been embezzling funds collected on behalf of WCMC. According to the informant Peter Bardunias panicked that the County might learn of his illicit

activities, and the lump sum payments made in May and June, 1982 were an attempt by him to put back the money he had stolen.

On or about August 10, 1982, Assistant District Attorney Jon N. Willcox commenced a criminal investigation of the collection activities of Rosen & Bardunias. The investigation developed evidence tending to show that Peter Bardunias had committed Grand Larceny and the Falsification of Business Records in the First Degree. In order to uncover further evidence of the criminal activity under scrutiny, ADA Willcox obtained a warrant from County Judge James R. Cowhey to search the offices of Rosen & Bardunias at 199 Main Street, White Plains, New York. The no-knock warrant was executed on October 8, 1982.

Extensive Grand Jury proceedings followed the October 8th search, which culminated in the indictment of Peter Bardunias and his wife and employee, Bonnie, on May 31, 1984 for Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree, and offering a False Instrument for Filing in the First Degree.

The criminal trial of Peter and Bonnie Bardunias began on May 30, 1985. The charges against Bonnie Bardunias were dismissed on May 30, 1985, upon the completion of the prosecutor's opening statement. The charges against Peter Bardunias were dismissed on June 26, 1985, at the close of the prosecutor's case.

2. Proceedings Below

In or about October, 1983 petitioners Peter and Bonnie Bardunias and others commenced an action against

the respondents for false imprisonment, assault, conversion and the violation of civil rights in connection with the October 8, 1982 search of the law offices. That lawsuit is referred to as Action No. 1 in the decision and order of the Court to which the writ is sought, the Appellate Division, Second Department, of the Supreme Court of the State of New York. (See A-1 to A-7)[1]. With regard to that action the allegedly illegal conduct of the members of the Westchester County District Attorney's office was given only a qualified immunity by the court below. (A-4 to A-5). The rulings of the court below with respect to Action No. 1 are *not* the subject of petitioners' application to this Court.

This action, referred to as Action No. 2 by the courts below, was commenced in 1986, and arises out of the prosecution of Peter and Bonnie Bardunias by the District Attorney's office. Also plaintiffs in the action are the children of Peter and Bonnie Bardunias, who are asserting derivative claims.

In their complaint, plaintiffs alleged that:

> "15) The defendant Willcox and other attorneys on the staff on the defendant Vergari presented evidence to the grand jury which they knew or should have known was false and grossly misleading.
>
> "16) The defendant Willcox and other attorneys on the staff of the defendant Vergari failed to present evidence to the grand jury which they knew or should have known would show the falsity and grossly misleading nature of the evidence presented.

---

[1] Reference is to the appendix to the petition.

"18) The defendants Willcox and Vergari and other attorneys on the staff of the Westchester County District Attorney maliciously obtained an indictment against Bonnie Bardunias solely to use it as leverage against Peter Bardunias.

"23) As a result of the investigation by the defendant Vergari and his employees, the defendants knew or should have known that there was no criminal conduct by Peter Bardunias or Bonnie Bardunias.

"24) Though they knew that Peter Bardunias and Bonnie Bardunias committed no criminal acts, the defendants continued to investigate and prosecute them.

"25) The defendant Willcox had personal animosity against Peter Bardunias and Rosen and Bardunias and the defendant Vergari was aware of that fact and failed and refused to remove defendant Willcox from the investigation and prosecution."

(A-33 to A-36).

The complaint in Action No. 2 is devoid of any mention of federal statutory or constitutional rights, and endorsed upon the summons was a notice that the nature of the action was for "malicious prosecution". (Record below at A38). (See N.Y. Civ. Prac. R. 305(b) [McKinney 1990]). By contrast, the summons in Action No. 1 listed the causes of action as "defamation, assault, unlawful imprisonment, wrongful conversion and destruction of and damage to property, abuse of process, abuse of execution of process and prima facie tort, and violation 42 USC 1983". (Record below at A15). In addition, at

paragraph 18 of the complaint in Action No. 1 the plaintiffs alleged that, "The defendants and other public servants conspired to cause the injury and damage to plaintiffs in violation of their civil rights". (Record below at A18).

Following joinder of issue in Action No. 2, defendants moved for partial summary judgment dismissing the first seven causes of action, which were for malicious prosecution, on the ground of absolute immunity. (The eighth cause of action was for breach of contract. It has been settled.) No federal question was raised by the motions, and the trial court, passing solely upon the state law claim, wrote:

> "CAUSES OF ACTION RELATED TO THE PROSECUTION
>
> "Defendants' motions for summary judgment are based primarily upon their assertion that the plaintiffs' causes of action are barred by the absolute immunity of the movants. Questions involving the extent of prosecutorial immunity in a case such as this can be more easily addressed by first examining its application to plaintiff's malicious prosecution causes of action in Action No. 2.
>
> * * *
>
> "It is well established that a District Attorney and his Assistant District Attorneys are entitled to absolute immunity for quasi-judicial actions taken within the scope of the official duties, such as initiating and pursuing a criminal prosecution and presenting the State's case. [Citations omitted.] The Supreme Court has stated that qualifying a prosecutor's immunity while he or she was performing a quasi-judicial

function 'would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system', *Imbler v. Pachtman*, 424 US at 427-28.

"Plaintiffs' malicious prosecution causes of action are primarily grounded upon alleged improprieties on the part of A.D.A. Willcox in his presentation of the State's case to the Grand Jury. Plaintiffs' complaint in Action No. 2 contain allegations that A.D.A. Willcox knowingly and maliciously presented false testimony to the Grand Jury, withheld evidence which would have allegedly exonerated Peter and Bonnie Bardunias and continued the Grand Jury investigation though he allegedly knew that Peter and Bonnie Bardunias had committed no crime. While these are certainly very serious allegations, the Court finds that any of plaintiffs' causes of action in Action No. 2 which are based on these allegations, should be dismissed since the alleged misconduct occurred while the prosecutor was performing his quasi-judicial function of presenting the State's case and, therefore, absolute immunity attaches to the case and, therefore, absolute immunity attaches to the prosecutor's actions. [Citations omitted]" (A-13 and A-15 to A-18)

Plaintiffs then appealed that determination, and at page 8 of their brief to the Appellate Division wrote as follows under the heading *"THE CIVIL ACTION"*:

"Plaintiffs instituted the instant action for *malicious prosecution* after the dismissal of all charges. The defendants moved to dismiss claiming absolute prosecutorial immunity and the motion was granted. It is from that judgment that plaintiffs appeal." (emphasis added).

The Appellate Division affirmed the dismissal of the malicious prosecution causes of action, and in doing so did not pass on any federal question. Plaintiffs then sought leave to appeal to the Court of Appeals of the State of New York, which was denied, as was their request for reargument. Their applications to New York's highest court did not contain any charge that defendants violated federal law.

SUMMARY OF ARGUMENT

1. No federal question is raised by the petitioners' request for review of an order dismissing their common-law malicious prosecution action. 28 U.S.C.A. 1257(a). Furthermore, even if a federal question has been raised before this Court, it was not pressed or passed upon in the state courts, where the action was advanced solely on the basis of New York common law. Thus, even if this Court is not jurisdictionally barred from granting certiorari, there is, at the least, a weighty presumption against review. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). Petitioners have made no showing to overcome the presumption, and the sparse record and lack of opportunity for the state courts to pass upon the federal question militate against granting the writ.

2. The substantive questions raised by this application do not warrant review. Petitioners have failed to show that the scope of absolute immunity found by the court below conflicts with decisions of other state courts or the federal Courts of Appeals. Furthermore, the

grounds petitioners advance for deviating from the general rule granting prosecutors absolute immunity in connection with their actions in obtaining an indictment from a Grand Jury are either unsupported by the record or contrary to precedent.

Petitioners have also failed to show that the outcome below conflicts with any decision of this Court or needs to be decided by it. While they decry that the genuinely wronged person is left without civil redress, this Court has already recognized that such a concern is outweighed by the public interest in having vigorous and fearless performance of the prosecutor's duties. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

ARGUMENTS AGAINST GRANTING THE WRIT

I. REVIEW SHOULD BE DENIED AS NO FEDERAL QUESTION IS RAISED. FURTHERMORE, EVEN IF SUCH A QUESTION HAS BEEN RAISED BY THE PETITION, IT WAS NOT PRESSED OR PASSED UPON BELOW, AND PETITIONERS HAVE FAILED TO MAKE ANY SHOWING TO OVERCOME THE WEIGHTY PRESUMPTION AGAINST REVIEW UNDER SUCH CIRCUMSTANCES.

Petitioners describe their claim as a state action "for malicious prosecution under the Fourteenth Amendment" (Petitioners' brief, p. 10). Their characterization is, at the least, anomalous.

A cause of action for malicious prosecution evolved from the common law, not the Constitution. It was recognized long before the Fourteenth Amendment was adopted. See *White v. Frank*, 855 F.2d 956, 959 n.2 (2d Cir.

1988); *Hastings v. Lusk*, 22 Wend. 410, 417 (N.Y. 1839); *Perkins v. Mitchell*, 31 Barb. 461, 468 (N.Y. Sup. Ct. 1860). This Court lacks jurisdiction to review a state court decision construing state common law. See 28 U.S.C.A. 1257(a).

The elements of a cause of action for malicious prosecution are the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, the termination of the proceeding in favor of the accused, the absence of probable cause for the criminal proceeding, and actual malice. *Broughton v. State*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 94, *cert. denied*, 423 U.S. 929 (1975). It may be that official conduct fitting these elements also gives rise to liability under 42 U.S.C. 1983. *White v. Frank*, 855 F.2d at 961 n.5; cf. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The remedy afforded by Section 1983 is supplementary to the state remedy. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Nevertheless, neither in their petition to this Court or in the state court proceedings have petitioners asserted that they were making a claim pursuant to 42 U.S.C. 1983 in Action No. 2.

Even if this Court were to construe the petition as inartfully raising a federal question, review should be denied because the claim was not pressed or passed upon in the state courts. While such an omission may not be a jurisdictional bar to review, it creates a weighty presumption against it. *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983).

Petitioners have made no attempt to rebut the presumption. No argument is made that the state courts need not have been given an opportunity to decide the

question of federal law. Furthermore, as indicated below, the record is not properly developed to adequately address the issue raised. See *Bankers Life and Cas. Co. v. Grenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 1651 (1988). Lastly, petitioners' difficulty in clearly articulating the federal question does not bode well for its subsequent presentation should a writ be granted. See S. Ct. R. 14.5.

II. REVIEW IS NOT WARRANTED BECAUSE THE SCOPE OF PROSECUTORIAL ABSOLUTE IMMUNITY FOUND BELOW WAS NOT SHOWN TO BE IN CONFLICT WITH THE DECISIONS OF THIS COURT, FEDERAL COURTS OF APPEALS OR THE COURTS OF OTHER STATES, AND DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION.

In *Imbler v. Pachtman*, the prosecutor was alleged to have knowingly used perjured testimony at trial and to have suppressed exculpatory evidence of his expert. 424 U.S. 416. These activities were held to be entitled to absolute immunity from civil liability because they "were intimately associated with the judicial phase of the criminal process." *Id.* at 430.

In granting absolute immunity to Deputy District Attorney Pachtman, this Court was concerned "that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust". *Id.* at 423. While recognizing that such immunity will leave a "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of

liberty," this Court found that consideration outweighed by the broader public interest in ensuring that the prosecutor vigorously and fearlessly performs his duties. *Id.* at 427-8.

The *Imbler* decision left open whether a prosecutor would be entitled to similar immunity when his responsibilities "cast him in the role of an administrator or investigative officer rather than that of advocate". *Id.* at 430-1. Nonetheless, it acknowledged that the role of advocate for the state was not to be narrowly drawn, and that it involves actions preliminary to the initiation of a prosecution and actions apart from the courtroom:

> "A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence."

Id. at 431 n. 33; see *Malley v. Briggs*, 475 U.S. 335, 341-343 (1986) (dicta that prosecutor seeking indictment is entitled to absolute immunity).

In decisions subsequent to *Imbler*, prosecutors were granted only a qualified immunity when participating in clearly nonadvocatory functions such as participating in an illegal search and/or seizure. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

However, absolute immunity was broadly applied to prosecutors' involvement in Grand Jury proceedings, even when those proceedings were partially investigative. *Powers v. Coe*, 728 F.2d 97, 104 (2d Cir. 1984); *Gray v. Bell*, 712 F.2d 490, 502-4 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Only when the Grand Jury's activities were purely investigative has absolute immunity not been afforded against charges of prosecutorial misconduct in connection therewith. *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). In *Briggs* the prosecutor's misconduct occurred when the Grand Jury was engaged in a broad fact-finding mission that had not yet focused on any particular suspect. *Id.* at 23-24; *Gray v. Bell*, 712 F.2d at 502-504. Similarly, in a somewhat different context, New York's highest court has held that Grand Jury proceedings are administrative rather than quasi-judicial when the investigation has not yet progressed to the stage where individual wrongdoers have been identified or discrete charges of criminality raised. *McGinley v. Hynes*, 51 N.Y.2d 116, 125-6, 412 N.E.2d 376, 380, 432 N.Y.S.2d 689, 693-694 (1980), *cert. denied*, 450 U.S. 918 (1981).

If it is petitioners' contention that the court below erred in failing to conclude that this case falls within the *Briggs* exception to prosecutorial absolute immunity, the record clearly belies their position. Even petitioners' complaint acknowledges that petitioner Peter Bardunias was a subject of the respondents' investigation before Grand Jury proceedings began (A-32 to A-33). In addition, the search warrant application by respondent Willcox, which

was made before the Grand Jury convened, clearly indicated that the investigation had already focused on Peter Bardunias as a suspect in the commission of Grand Larceny and Falsification of Business Records in the First Degree, charges for which he and his wife were later indicted. (Record below at A86 to A99).

Petitioners have not made a broad attack on the absolute immunity generally accorded to prosecutors in the Grand Jury setting. To the extent that they may be seeking to expand or create exceptions to prosecutorial absolute immunity in connection with Grand Jury proceedings, they have failed to cite any authority in support of their position. Moreover, the record in this case is particularly poor for setting forth on such a venture. It contains only three pages of the transcript of the Grand Jury proceedings, and the allegations of wrongdoing in the complaint are no different than those made in numerous other Section 1983 and malicious prosecution actions dismissed on absolute immunity grounds. *Rose v. Bartle*, 871 F.2d 331, 343-5 (3d Cir. 1989) (soliciting perjured testimony before Grand Jury); *Grant v. Hollenbach*, 870 F.2d 1135 (6th Cir. 1989) (conspiracy to bring false charges); *Maglione v. Briggs*, 748 F.2d 116 (2d Cir. 1984) (bad faith prosecution); see *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) (withholding exculpatory evidence).

Petitioners also seemingly contend that because members of the District Attorney's office wore the mantle of the investigator at one stage of the underlying matter, i.e., the search, they may not claim absolute immunity when they subsequently became advocates. Petitioners have cited no authority for such a position, which the

Eleventh Circuit Court of Appeals characterized as "unsupported by both reason and precedent." *Mullinax v. McElhenney*, 817 F.2d 711, 715 (1987); see also, *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (absolute immunity granted to prosecutor vis-a-vis malicious prosecution claim but not for claim arising out of participation in search); *Cunningham v. State of New York*, 71 A.D.2d 181, 422 N.Y.S.2d 497 (N.Y. App. Div. 1979) (With respect to Grand Jury proceedings, prosecutor entitled to absolute immunity for failing to properly instruct it on law, introducing inadmissible evidence, lack of impartiality, lack of probable cause, overzealous cross-examination of witnesses, selective and highly distorted presentation of evidence, and introducing altered recorded conversations. However, only qualified immunity attached to prosecutor's use of an overtly false affidavit to obtain a wiretap warrant).

Lastly, petitioners contend that by granting prosecutors absolute immunity, they could maliciously harm their enemies without any deterrent. (Petitioners' brief, p. 10). This Court already thoroughly analyzed and resolved that issue in *Imbler*, and petitioners have raised no new considerations in their application.

CONCLUSION

This Court lacks jurisdiction to grant the writ sought by the petitioners. In the alternative, if jurisdiction exists, the petition for a Writ of Certiorari should be denied as the federal question was not pressed or passed upon below, and because petitioners have failed to show that the decision of the Court below deviated from any precedent in this often litigated area.

Respectfully submitted,

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